



OCT 23 1944

CHARLES ELMORE DODDLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

No. 499

THE EMIGRANT INDUSTRIAL SAVINGS BANK,
Plaintiff-Respondent,
against

EMIL J. SONDERLICK,
Defendant-Petitioner,

CATHERINE M. TERRIAULT, *et al.,*
Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWIN A. BERKERY,
JOHN E. MCANIFF,
No. 51 Chambers Street,
New York City,
Counsel for Respondent.

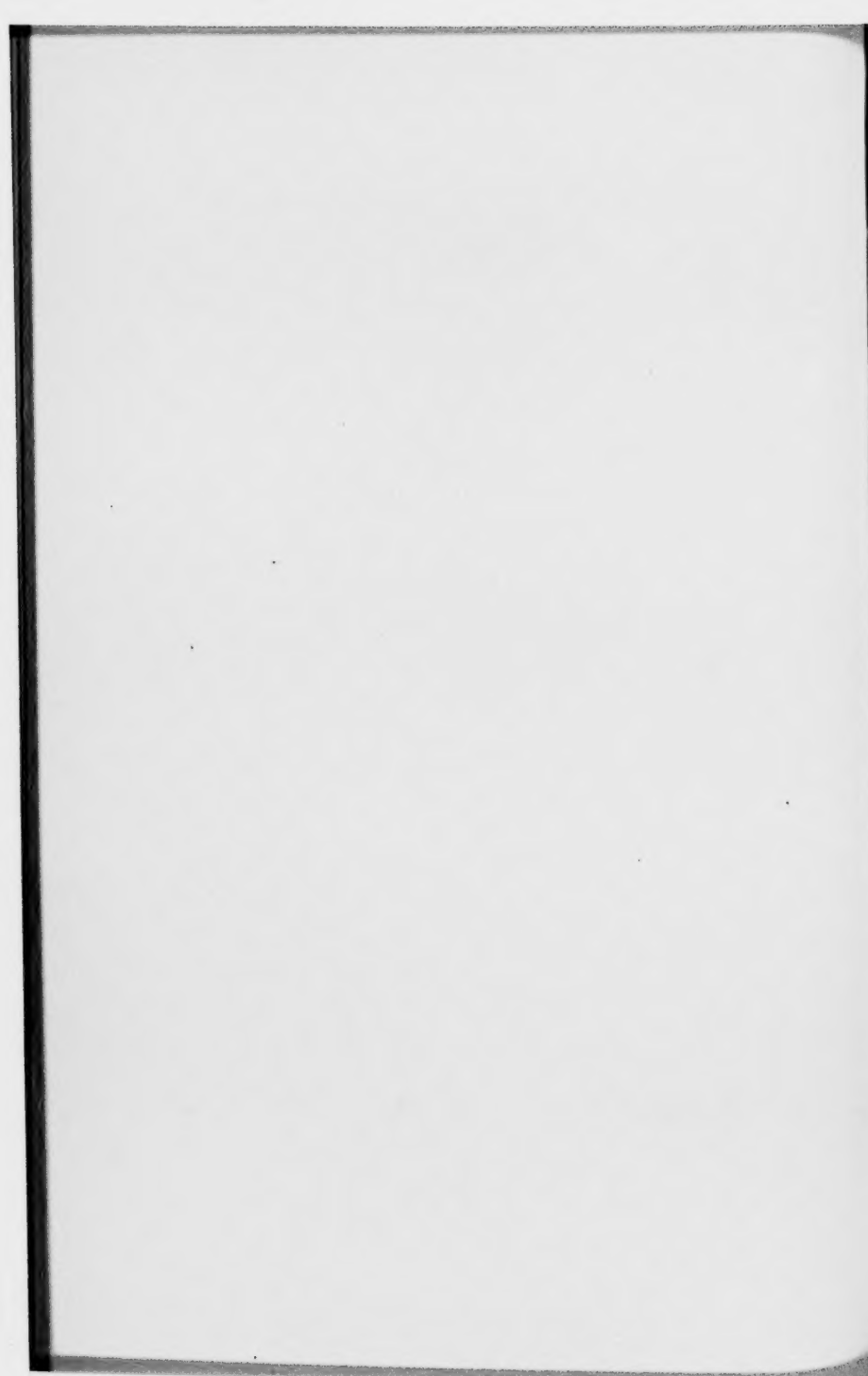


TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Statement	2
ARGUMENT	
There is no federal question involved in this case	3
Conclusion	7

CASE CITED

Southwestern Bell Telephone Co. v. Oklahoma (1938), 303 U. S. 206, 212	7
---	---

OTHER AUTHORITIES CITED

Judicial Code as Amended	
Section 237(b)	1
28 U. S. C. Section 344(b)	1
New York Rules of Civil Practice, Rule 113	3
New York Rules of Civil Practice, Rule 179	2



Supreme Court of the United States

OCTOBER TERM, 1944

THE EMIGRANT INDUSTRIAL SAVINGS BANK,
Plaintiff-Respondent,

against

EMIL J. SONDERLICK,
Defendant-Petitioner,

CATHERINE M. TERRIAULT, *et al.,*
Defendants.

No. 499

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinion Below

No opinion was written by the Courts below except a memorandum decision of Special Term of the Supreme Court of the State of New York (R. 111).

Jurisdiction

Petitioner has invoked the jurisdiction of the Supreme Court under Section 237(b) of the Judicial Code as amended, 28 U. S. C. Section 344(b).

Statement

Respondent held a first mortgage on the real property at 8716 Britton Avenue, Elmhurst, Queens County, New York (R. 53). The principal amount of the mortgage was

\$20,950 (R. 47). In November, 1941, the mortgage fell into default when the interest and taxes were not paid. The complaint was in the usual form, alleging that the interest and taxes were unpaid and that, because of the failure to make such payments, the entire principal amount had become due (R. 51-53).

When the foreclosure action was begun in February, 1942, the real property covered by the mortgage was in the possession of Thomas J. Hallinan, who had been appointed Receiver of the property in an action entitled "*Gelly v. Kalamon*," which was a suit in the nature of an accounting involving rents derived from the real property. In accordance with the provisions of Rule 179 of the Rules of Civil Practice, providing in part that "where a receiver has been appointed, his appointment shall be extended to any subsequent suit or proceeding relating to the same estate or property in which a receiver is necessary." Respondent obtained the extension of the receivership to include the foreclosure action. Accordingly, Thomas J. Hallinan became the Receiver in this foreclosure action.

The amended answer of Petitioner, after making various admissions and denials, set up two affirmative defenses. The first defense was to the effect that there was another foreclosure action pending upon the same property (R. 65). That defense was, however, subsequently withdrawn by stipulation (R. 112). The second defense was to the effect that the original receivership was void, that the extended receivership was likewise void, and that Respondent had conspired with the Receiver for the purpose of allowing him to escape the consequences of the illegal receivership (R. 66-67).

After issue had been joined, Respondent made a motion for summary judgment. Petitioner made a cross-motion

for an order vacating the extended receivership. The motions were heard together at Special Term of the Supreme Court. Respondent's motion for summary judgment was granted, and Petitioner's cross-motion to vacate the extended receivership was denied.

Petitioner appealed to the Appellate Division of the Supreme Court, Second Department, which unanimously affirmed both determinations (267 App. Div. 764, Case 2; 267 App. Div. 880, Case 2).

Thereafter, Petitioner made a motion in the Appellate Division for permission to appeal to the Court of Appeals from the order granting Respondent's motion for summary judgment. The motion was denied by the Appellate Division (267 App. Div. 909).

Subsequently, Petitioner made a motion in the Court of Appeals for permission to appeal. That motion was likewise denied on May 25, 1944.

ARGUMENT

There is no federal question involved in this case.

Careful examination of the Record fails to disclose the existence of any federal question. Under Rule 113 of the Rules of Civil Practice, it is provided generally that the answer in an action may be stricken out unless the Defendant shows by affidavit or other proof that there is a triable issue of fact. In this case Petitioner did not meet the requirements of the rule. He failed to show that there was any triable issue of fact. Accordingly, the Court concluded "that no triable issues exist and that there is no merit to

the defendant's amended answer or to his cross-motion to vacate the extended receivership" (R. 111). The Court's decision was made upon the papers which were submitted on the motion for summary judgment, namely, the pleadings and the affidavits. The papers considered on the motion are recited in the Order (R. 21-23). Petitioner, therefore, is in error when he says that he was deprived of his property because of an adjudication in another action to which he was not a party (Brief pp. 8, 11). The plain fact is that he lost the property because he failed to pay the interest and taxes. The Record shows that when the motion for summary judgment was made, the interest defaults were \$2,054.52 and the tax defaults were \$1,716.96 (R. 47, 48).

There were, it is true, other adjudications in which the Courts had passed upon questions which were germane to this foreclosure action. Those adjudications showed conclusively that the extraneous points raised by Petitioner in this action were without merit. For example, Petitioner contended, and still contends, that the original receivership, which was extended to include this foreclosure action, was illegal and void. The original receivership was obtained in an action entitled "*Gelly v. Kalamon and others*," which was an action in the nature of an accounting involving the rents derived from the real property, which is the subject of this foreclosure action. When the Receiver was appointed in the *Gelly* action, Petitioner immediately moved in that action as attorney for Kalamon, one of the defendants, and also on his own behalf, as owner of the mortgaged premises, for an order vacating the receivership on the ground that it was illegal and void. The motion was denied in the Supreme Court, and the order denying the motion was unanimously affirmed by the Appellate Division, Second Department (262 App. Div. 875).

When the receivership in the *Gelly* action was extended to include this foreclosure action, the Receiver moved to settle his accounts for the period extending from the date of his original appointment to the date of extension. The Receiver's motion to settle the accounts was opposed by Petitioner, but the motion was granted. Petitioner took an appeal from the Receiver's order of settlement and discharge, and the order was unanimously affirmed by the Appellate Division, Second Department (265 App. Div. 967).

Petitioner then commenced an action in the Supreme Court of the State of New York, Bronx County, against the Receiver on the ground that the original receivership was illegal and void. In that action the Receiver made a motion for summary judgment, which was granted in the Supreme Court. Judgment in favor of the Receiver was thereupon entered. Petitioner appealed from the judgment, but it was unanimously affirmed by the Appellate Division of the Supreme Court, First Department.

Petitioner's claim to sole ownership of the property is at variance with the facts. In an action entitled "*Joseph Kalamon v. Anna Kalamon and Emil J. Sonderlick*," in the Supreme Court of the State of New York, Queens County, Joseph Kalamon recovered an interlocutory judgment by default, entered February 5, 1941, cancelling and setting aside the deed under which Petitioner claimed title to the premises. The Petitioner moved to vacate the interlocutory judgment, and his motion was granted at Special Term of the Supreme Court, Queens County. That decision, however, was reversed by the Appellate Division, Second Department, which reinstated the judgment cancelling and setting aside Petitioner's deed (262 App. Div. 762). Petitioner applied to the Court of Appeals for permission

to appeal, but the application was denied (287 N. Y. 755). Thereupon a final judgment was entered, cancelling and setting aside the deed under which the Petitioner claimed title to the premises.

Petitioner has raised four points in his argument (Brief p. 11). None of those points is sufficient to raise a federal question.

In the first point, Petitioner contends that Respondent's moving affidavits on the motion for summary judgment were insufficient, and that his own affidavits raised questions of fact. That, of course, is purely a state question, and the Courts have decided against Petitioner on that point.

In the second point, Petitioner contends that his defense was bona fide, substantial and in good faith. Again, that was a matter for the state Courts to decide, and they have decided it against Petitioner.

In the third point, Petitioner contends again that the original receivership was void. That also is a state question which has been decided against Petitioner on several occasions by the state Courts.

In the fourth point, Petitioner contends that he was deprived of his property without due process of law because his answer was dismissed without a trial, and on the basis of an alleged adjudication in another action to which he was neither party nor privy. We have already shown that Petitioner's answer in the foreclosure action was stricken out by the Court because he failed to raise any triable issue of fact, and not because of an adjudication in any other action. We have also shown that Petitioner's repeated statements that he was neither party nor privy to the *Gelly* action are contrary to the facts. In the *Gelly* action, Peti-

tioner appeared as attorney for one of the defendants, and also intervened, in his own behalf, in an effort to vacate the receivership on the ground that it was illegal and void.

Thus it appears that the only suggestion of a federal question in this case is Petitioner's gratuitous statement in his brief, and in his motions for permission to appeal in the Appellate Division and in the Court of Appeals, that there is one.

The Record does not show that any federal question was presented to the state Courts or was decided by them. Indeed, it appears affirmatively from the Record that the case involved only state questions. Under those circumstances, this Court has consistently refused to grant a writ of certiorari.

"We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

Southwestern Bell Telephone Co. v. Oklahoma
(1938), 303 U. S. 206, 212.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWIN A. BERKERY,
JOHN E. McANIFF,
Counsel for Respondent.

October 21, 1944.